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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Satellite Delivery of Network Signals
to Unserved Households for
Purposes of the Satellite Home
Viewer Act

Part 73 Definition and Measurement
of Signals of Grade B Intensity

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CS Docket No. 98-201
RM No. 9335
RM No. 9345

REPLY COMMENTS OF SUPERSTAR/NETLINK GROUP LLC

Michael K. McKee
Superstar/Netlink Group LLC
7140 South Lewis Avenue
Tulsa, OK 74136
(918) 488-4000

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REPLY COMMENTS OF SUPERSTAR/NETLINK GROUP LLC

Superstar/Netlink Group LLC ("SNG") hereby submits these Reply Comments in response to the various comments filed in the above-captioned rulemaking proceeding.

I. INTRODUCTION AND SUMMARY

There is absolutely no justification—in the record, copyright law, the Communications Act or anywhere—for denying consumers access to satellite-delivered network programming when those consumers cannot receive viewable network signals off-air. This rulemaking should be about giving these "unserved" consumers a choice of receiving network programming from satellite, cable, or whatever other type of video provider they wish, unfettered by arbitrary regulatory classifications. Unfortunately, the broadcasting industry instead insists on distracting attention from this premise and argues about local broadcasters' advertising revenues and "scofflaws." It seems rather ironic that the broadcasters—charged

with serving the public interest—are so concerned with the potential loss of advertising revenues that they advocate a significant proportion of television viewers be arbitrarily denied access to the very programming and signals that they themselves characterize as "an important source of information . . . [and] an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought and expression."¹ The denial of access is justified in their view because the broadcasters may lose advertising revenues—revenues that are a windfall anyway because the consumers whom they count as part of their audience (and thus are the basis for earning advertising revenues) cannot even receive the local affiliates' signals and see the programs or advertisements.

It cannot be disputed that every household in America should be able to receive and view acceptable pictures of broadcast network programming. This was one of the primary goals of amending the copyright laws when Congress enacted the Satellite Home Viewer Act ("SHVA" or "Act"). At no time did Congress intend the Grade B standard to be anything other than a proxy for *actual* reception of off-air signals. That standard has proven to be inadequate, especially in light of the advancements in technology. The Commission, charged as it is with advancing the public interest should not let the broadcasters' narrow interpretation and derogation of the public interest control the process of amending the Commission's rules. Accurate predictive models have been created and are now in use. However, the debate over the use of these predictive models, the measurement standards, and the testing procedures has

¹ Comments of the National Association of Broadcasters ("NAB") at 53, *quoting Turner Broadcasting Sys. v. FCC*, 117 S.Ct. 1174, 1188 (1997).

left consumers without access to network signals, and has disabled a critical function of SHVA. It is therefore imperative that the Commission acknowledge that the current grade B signal strength standard does not allow all consumers to receive an acceptable picture of network programming. The Commission should then use its expertise to designate the appropriate predictive model, measurements, and testing procedures to ensure that all consumers may receive acceptable pictures of network programming.

Although the issue is characterized by some as solely one of copyright law interpretation, it is more one of communications policy. "The ultimate touchstone for the FCC is thus the distribution of service, rather than of licenses or of stations; the constituency to be served is people, not municipalities." *National Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1197-98 (D.C. Cir. 1984). Moreover, copyright protection has never accorded the Copyright Owner complete control over all possible uses of his work, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). Indeed, protection of the copyright owner must be counter-balanced by societal interest in expanding "public access to freely broadcast television programs." *Sony*, 464 U.S. at 454 (citing *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 508 n. 12 (1983)). The broadcasters' efforts to refuse access to television programs violates these precepts and should be rejected outright.

II. THE COMMISSION HAS THE AUTHORITY AND JURISDICTION TO MODIFY THE GRADE B SIGNAL STRENGTH STANDARD

As set forth in the initial comments of members of the satellite industry, including those of SNG, the Commission has the authority not only to modify the grade B standard as it deems necessary, but to determine the appropriate methods of predicting and measuring it. As further addressed in the reply comments of the SBCA, the arguments set forth in the comments of the broadcasters and their affiliates are not convincing. Such arguments in no way negate the arguments of the SBCA or the rest of the satellite industry, and, therefore, the Commission should conclude that it does indeed have the authority and jurisdiction to proceed in this matter. The Commission should also confirm its tentative conclusion that Congress did not freeze the current grade B standard in 1988 for purposes of SHVA—nothing in the statute indicates that this was the intention.

III. THE COMMISSION CAN AND SHOULD ESTABLISH METHODOLOGIES FOR PREDICTING AND MEASURING GRADE B SIGNAL STRENGTH AT INDIVIDUAL HOUSEHOLDS

In their comments, the broadcasters state that "Congress adopted a simple, objective test for determining eligibility under SHVA."² The broadcasters' own conduct in the multiple lawsuits belies the accuracy of that conclusion. Satellite distributors such as SNG are today faced with the difficulty of implementing two different qualification systems as required by the rulings of two federal judges, as well as a third qualification system resulting from a

² NAB Comments at 9.

settlement agreement between the broadcasting industry and Netlink International. The broadcasters' unflinching insistence on applying this "simple" test produced lengthy court opinions and a 43 page settlement agreement interpreting and applying the outdated Grade B standard.

Additionally, the broadcasters state that the Commission "[c]annot substitute a predictive model for the Act's site measurement requirement."³ It is ludicrous to suggest that site measurements must be taken at every subscriber's individual household before a determination of eligibility can be reached when SHVA contains no such requirement. Their conclusion also contradicts the broadcaster's and affiliate's own use of such predictive models in challenging satellite customers, as well as their arguments in support of the Longley-Rice predictive methodology in their comments to the Commission and to Federal Courts in Florida and North Carolina.⁴

If technology exists today that can predict with a high degree of accuracy those consumers that "cannot receive, through the use of a conventional outdoor rooftop receiving antenna, an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated with that network," then the technology should be used to do exactly that. The comments of the satellite industry in

³ Joint Comments of the ABC, CBS, FOX, and NBC Television Network Affiliate Assoc. (the "Affiliate Assoc.") at 57.

⁴ Affiliate Assoc. Comments at 60.

general as well as several independent engineers suggests that such technology does exist. SNG is a member of the SBCA and generally supports the SBCA's position in its initial and reply comments. The Commission must ultimately use its expertise to review and adopt the appropriate signal strength standard, a highly accurate predictive model, reliable measurements, and reasonable testing procedures to fulfill the Commission's own vital public interest mandate.

While SNG realizes the implementation of any consumer qualification system is going to involve an initial investment, SNG urges the Commission to consider cost and efficiency when making its determination. It is the hope of SNG that the adoption of one uniform qualification system for all satellite carriers will alleviate the long term costs of maintaining three or more separate systems. Additionally, any system the Commission adopts should be readily accessible, as time is essential to the many consumers who are being refused service or are in danger of losing their network signals.

IV. MODIFICATION OF SHVA WILL NOT HARM LOCALISM, BUT WILL FURTHER CONGRESS' INTENT TO PROVIDE NETWORK SIGNALS TO ALL CONSUMERS AND PROMOTE COMPETITION

SNG recognizes and does not dispute the importance of local programming to communities across the United States. Additionally, SNG does not take the position that it should deliver distant network signals to those consumers that are "served" with local, over-the-air network signals. However, it is abundantly clear that hundreds of thousands of consumers who are *not* "served" will be deprived of network programming altogether, and

millions more will be deprived of the choice of satellite providers. This result cannot promote localism, as unserved consumers will lack access to local programming, and will therefore blame the local affiliate for their inability to receive any network programming.

A. Implementation of a More Accurate Predictive Methodology May Actually Promote Localism.

When SHVA was adopted in 1988, the representatives of the broadcasting industry stated that "the first goal is to achieve universal service," and that such broadcasting companies were entering into arrangements with satellite carriers "as a public service and will receive no compensation" from the satellite carriers under such arrangements.⁵ However, it is clear today from the comments of the broadcasters and their affiliates that this primary goal has been abandoned and that there is little or no concern for whether a subscriber can actually see network programming. Instead, the broadcasters' primary concern is for the profitability of the stations themselves as advertising revenues may be put at risk by a questionable viewer counting system that includes individual households within the current predicted grade B contour that cannot actually receive grade B signals. The broadcasters and affiliates wish to include in their "viewership" an area which only guarantees with a fifty percent confidence level that at least fifty percent of the people within a geographically large area receive the service ninety percent of the time. Under such a system, the local affiliates are able to claim the unserved consumers as part of their local audience, thereby overstating their carriage to

⁵ Hearing Before the Subcomm. On Courts, Civil Liberties and the Administration of Justice, House Comm. on the Judiciary, 100th Cong. (Jan. 27, 1988) (testimony of Thomas S. Rogers, Vice President of Policy Planning and Business development for National Broadcasting Company, Inc.) at 206 and 207.

advertisers and increasing their advertising revenue. Admittedly, the more advertising revenues a station can collect, the greater chance that there will be better programming to be provided to viewers. This conclusion, however, does not make any sense when the improved programming cannot be delivered to or seen by the very audience that made it possible to create.

Moreover, the amount of lost advertising revenue is not documented and questionable. Not every consumer who is "unserved" will receive distant network signals. Many will continue to rely on cable for receipt of their local signals precisely because local programming is so important to the American public. Eventually, there may be a solution allowing satellite consumers to receive their local network signals from their satellite providers, but until that solution is available, "unserved" consumers should have the choice of receiving network signals from a satellite carrier rather than being deprived of access altogether (or have access only through cable).⁶

⁶ The broadcasters are so concerned with the possibility of losing viewers, that they fail to consider the fact that a more accurate predictive model could actually add viewers by identifying those subscribers outside the grade B contour that would be predicted to receive their signals over-the-air. Under the current system, most affiliates only challenge those subscribers within the predicted grade B contour. By using a system that looks at each individual household, it will identify households outside the predicted grade B contour that can receive an adequate signal, making that previously "unserved" consumer "served."

B. Promotion of Competition in the Video Marketplace Is and Always Has Been a Part of SHVA

The broadcasters' statement that SHVA was not intended to maximize competition by satellite with cable, and instead generally prohibits competition is inaccurate.⁷ This claim of the broadcasters can be contradicted not only by legislative history of the Act, but by representations made by Congress and its members in numerous other public documents and letters,⁸ and by representations made by the broadcasters themselves. In fact, during the 1988 SHVA hearings, the representatives of the broadcasting industry stated that the decision to not authorize subscribers passed by a cable system is consistent with localism, and "is by no means intended to favor cable as a technology or as a distribution system."⁹ Furthermore, it has been said that "it has long been the bipartisan objective of Congress to de-monopolize the provision of multichannel video services in order to create jobs, lower consumer rates, and create new choices in the marketplace."¹⁰ As part of that objective, Congress has sought to support alternative methods for delivering multichannel video programming to subscribers in

⁷ NAB comments at 63.

⁸ "The development of this package is a positive event in the evolution of the home dish market and has hopefully let the "Genie of competition" out of the bottle and into the marketplace." Additional Views of Mr. Tauzin, H.R. Rep. No. 100-887 (II) at 44. CITE others.

⁹ Hearing Before the Subcomm. On Courts, Civil Liberties and the Administration of Justice, House Comm. on the Judiciary, 100th Cong. (Jan. 27, 1988) (testimony of Thomas S. Rogers, Vice President of Policy Planning and Business development for National Broadcasting Company, Inc.) at 208.

¹⁰ Letter from Congressmen Billy Tauzin and Edward J. Markey to James Billington, Librarian of Congress, dated Sept. 9, 1997.

numerous ways, including the adoption of SHVA.¹¹ Additionally, when the 1988 satellite license was scheduled to sunset at the end of 1994, Congress extended it with explicit directives to cultivate DBS as a competitor to cable and to look to cable parity as the "benchmark" for DTH royalties.¹² Increasing the ability of multichannel distributors to compete was the intent of SHVA when enacted in 1988. The Commission must maintain, not frustrate, that intent.

V. CONCLUSION

If the Commission correctly determines that it not only has the authority to proceed in this matter, but the obligation, then it should insure that all consumers have both access to

¹¹ *Satellite Broad. & Communications Ass'n of Am. v. Oman*, 17 F.3d 344, 346-47 (11th Cir.), *cert. denied*, 115 S.Ct. 88 (1994); 17 U.S.C. § 119. The original satellite royalty fees established by Congress when it passed SHVA in 1988 approximated the license fees cable operators paid for the same or similar superstations and distant broadcast network signals. *In the Matter of Rate Adjustment for the Satellite Carrier Compulsory License*, Docket No. 96-3 CARP-SRA, Report of the Panel (August 28, 1997) at 12, *aff'd in part and rev'd in part*, Final Rule and Order, 62 Fed. Reg. 55742 (Oct. 28, 1997), *appeal pending*, *SBCA v. Librarian of Congress*, No. 97-1659 (D.C. Cir.). Congress also supported competition by defining DTH satellite services as "effective competition" to cable and by the establishment of the "program access" rules. 47 U.S.C. §§ 543(l), 522(13); *In re Implementation of Sections of the Cable Television Consumer Protection Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266, 8 FCC Rcd 5631, ¶¶19, 32 (1993); *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, CS Docket No. 94-48, 9 FCC Rcd 7442, ¶¶ 37-50, 61 (1994)(cable and DTH operate in the same product market); 47 U.S.C. § 548(a).

¹² 140 CONG. REC. S14105, S14106 (daily ed. October 4, 1994) (Statement of Sen. DeConcini); 140 CONG. REC. H9270 (daily ed. September 20, 1994) (Statement of Rep. Brooks); 140 CONG. REC. H9271 (daily ed. September 20, 1994) (Statement of Rep. Hughes); 140 CONG. REC. H9272 (daily ed. September 20, 1994) (Statement of Rep. Synar).

broadcast television signals and a choice of providers by amending the Grade B signal strength standards. This will further the purpose of SHVA, as confirmed by the stated intent of the broadcasters when the satellite carriers began distributing distant network signals. The broadcasters' claim of unsubstantiated, possible lost advertising revenues today should not override this most basic purpose, nor should their legal disputes with certain satellite carriers justify wholesale denials of access to "unserved" consumers. The revision of the grade B signal strength and measurement standards that will allow consumers who do not receive an acceptable over-the air picture to choose to receive network service from competing multichannel providers will not be a "gift" to the "scofflaws" as the broadcasters claim; rather it will be the fulfillment of the broadcasters' and the Commission's public interest requirements.

Respectfully submitted,

A handwritten signature in black ink that reads "Michael K. McKee /com". The signature is fluid and cursive, with the last name "McKee" being the most prominent part.

Michael K. McKee
Superstar/Netlink Group LLC
7140 South Lewis Avenue
Tulsa, OK 74136
(918) 488-4000

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